(1)

89-1972

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IN THE MATTER OF

JAMES B. DANIELS, an Attorney-at-Law of the State of New Jersey,

Petitioner,

—v.—

SUPERIOR COURT OF THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Constitution prohibits states from punishing conduct as criminal contempt, and summarily, under a standard of mere "capacity" or "tendency" to obstruct the administration of justice.

2. Whether the summary criminal contempt conviction of a criminal defense attorney for a spontaneous non-verbal grimace of frustration in response to a critical ruling, made outside the presence of the jury, violates his first amendment rights of expression and the sixth amendment rights of his client to the vigorous representation of counsel.

3. Whether the Constitution guarantees a person the right to representation of counsel before being imprisoned summarily for criminal contempt.

4. Whether petitioner was afforded a fair hearing for criminal contempt that comported with due process, where petitioner disputed the trial judge's characterization of his non-verbal gestures for which he was held in contempt, immediately denied any disrespectful intent, and the statements of other witnesses contained in affidavits subsequently admitted to supplement the appellate record also materially contradict the judge's findings.

LIST OF PARTIES

The caption of the case contains the names of all parties except the organizations appearing amicus curiae before the New Jersey Supreme Court: New Jersey Department of the Public Defender; American Civil Liberties Union of New Jersey; Center for Constitutional Rights; Association of Criminal Defense Lawyers of New Jersey; New Jersey State Bar Association; and Trial Attorneys of New Jersey.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The decision of the Supreme Court of New Jersey is reported at 118 N.J. 51, 570 A.2d 416 (1990), and is reprinted in the Appendix. (1a-66a) The decision of the New Jersey Superior Court, Appellate Division, is reported at 219 N.J. Super. 550, 530 A.2d 1260 (App. Div. 1987), and is reprinted in the Appendix. (67a-204a). The order and supplemental order of the trial court holding defendant in contempt and imposing sentence are unreported. (App. at 205a, 209a).

JURISDICTION

The judgment and opinion of the Supreme Court of New Jersey, affirming the judgment of the trial court summarily convicting defendant of contempt, was entered on February 28, 1990. On May 16, 1990, Associate Justice William Brennan signed an order extending petitioner's

time to petition for certiorari to and including June 18, 1990. This Court has jurisdiction to review the judgment of the Supreme Court of New Jersey pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

FIRST AMENDMENT UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

SIXTH AMENDMENT UNITED STATES CONSTITUTION

Jury trial for crimes and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by and impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed by the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT, SEC. ONE
UNITED STATES CONSTITUTION

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.J.S.A. 2A:10-1

The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:

a. Misbehavior of any person in the actual presence of the court;

b. Misbehavior of any officer of the court in his official transactions; and

c. Disobedience or resistance by any court officer, or by any party, juror, witness or any person whatsoever to any lawful writ, process, judgment, order, or command of the court.

18 U.S.C. § 401 (1970)

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority,and none other, as --

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

STATEMENT OF THE CASE

A. Procedural History

On March 19, 1986 petitioner James B. Daniels, Esq. was convicted of contempt by a judge of the Superior Court of New Jersey and sentenced to two days in jail and a fine of $500.00. Later that day, the Appellate Division granted leave to appeal and a stay of sentence. (207a) On March 24, 1986, the trial court issued a supplemental Order of Contempt. (209a)

On May 2, 1986, petitioner filed a motion to supplement the record (226a) through a remand for the taking of testimony, which was denied by Appellate Division Order dated June 2, 1986. (229a) The court ordered instead that the affidavits of James Tighe and James B. Daniels be appended to the record. (229a) On July 14, 1986, the court granted the state's motion to supplement the record with the affidavit of Thomas Simon.

On July 30, 1987 the New Jersey Appellate Division affirmed the conviction of contempt by a divided court, but reversed the jail sentence imposed on petitioner. See Opinion at 67a to 204a. On February 28, 1990, the New Jersey Supreme Court affirmed the judgment of the Appellate Division with respect to all issues. See Opinion at 1a to 66a.

B. Statement of Facts

Petitioner, a public defender, represented the defendant in State v. McMahon, a trial for armed robbery, in which the sole evidence against the defendant originally was a stranger's identification. During pretrial hearings on March 18, 1986, there was long and passionate argument concerning a polygraph test that the state sought to introduce based on an executed stipulation. (1T4-13ff; 1T46-1 to 47-21).[1] Petitioner moved

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1. "1T" refers to the transcript for March 18, 1986; "2T" refers to the

to exclude the State's polygraph test, or in the alternative to rebut it with expert testimony demonstrating the unreliability of polygraph tests, or with defendant's own prior polygraph results indicating innocence. (1T4-13ff; 1T37-19 to 23). The trial judge ruled adversely on all points.

The transcript of this argument evidences mounting tension and the judge's active participation in an aggressive give-and-take with petitioner:

> MR. DANIELS: [A]s part of my cross-examination of the state's expert polygraphist, will I be permitted to read the stipulation in its entirety, making reference to the fact he was aware that another test had been conducted?
>
> THE COURT: Absolutely not. There will be no reference, directly or indirectly, to that prior examination. You will not present to the jury, directly or indirectly by inference or otherwise, the fact that there was a prior examination. It is totally and completely inadmissible.

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transcript for March 19, 1986.

MR. DANIELS: Judge, if I may, what this stipulation says --

THE COURT: I don't want to hear any further argument on it. I will not permit further argument on it. I gave you your chance earlier. It's over.

MR. DANIELS: I have not been able to argue this point.

THE COURT: I'm sorry. I asked you any other point on the stipulation. You said no. No further argument.

MR. DANIELS: Judge --

THE COURT: Mr. Daniels, did you hear me?

MR. DANIELS: Yes, sir. I must insist --

THE COURT: You will not get it.

MR. DANIELS: I have not been given an opportunity to argue this.

THE COURT: You will not get this.

MR. DANIELS: I must have misunderstood the Court with reference to --

THE COURT: We've been doing this for over two hours. This hearing is over. (1T61-15 to 62-24).

Matters became more heated as the day proceeded. Following a lengthy presentation by petitioner of the propriety of the court taking judicial

notice of studies on the unreliability of polygraph examinations, the trial judge responded, "So what? So what on all of this?" (1T89-4). This produced the following exchange:

> MR. DANIELS: So what, Judge?
>
> THE COURT: That's exactly what I said. So what?
>
> MR. DANIELS: There couldn't be anything more important. I have been denied the opportunity to bring in my experts to talk about this.
>
> THE COURT: No you haven't been denied. You went into a stipulation agreeing not to do that. You weren't denied anything.
>
> MR. DANIELS: I am denied that; okay? The Court has ruled. I have said in spite of my stipulation I have asked to do this and the Court refused to allow me to.
>
> THE COURT: The answer is no, unequivocally, unalterably, no. Anything else on this point?
>
> MR. DANIELS: I just want to make sure that I understand the Court's ruling.
>
> THE COURT: Oh, stop. Don't posture with me. Anything else on this point?

MR. DANIELS: No.
(1T89-5 to 25).

Petitioner's subsequent motion requesting the court to take judicial notice of certain scholarly articles so that petitioner could educate the jury on what he considered to be the crucial evidence in the case, was denied after considerable oral argument. (1T85-3ff; 1T90-11 to 15). The court took exception to petitioner's response to his ruling. (1T90-16 to 18). Petitioner's reaction was a non-verbal physical reaction which the judge characterized as petitioner "sitting there shaking [his] head, smiling and being disrespectful." (1T90-23 to 24). The judge warned petitioner that further display of disapproval with the court's rulings would result in incarceration.

Immediately following a short recess, petitioner apologized to the judge, explaining that his response was a "human"

reaction and assuring the judge that he meant no disrespect. The judge responded: "Put it behind us and forget about it." (1T91-18 to 24). Pre-trial hearings consumed the remainder of the first day.

The second day of pre-trial proceedings opened with each attorney presenting arguments on the admissibility of the victim's identification, after which the judge ruled against the defendant. (2T2-2 to 15-2). Following this, petitioner sought permission to call a psychologist as an expert to testify to the underlying lack of reliability of the polygraph tests. (2T15-3 to 19-4). The judge stated his desire to think about the request, but indicated that his initial response was negative. (2T19-5 to 14). The rest of the day was spent picking a jury. (2T19-17ff).

Following the selection of the jury, but before the jury was sworn and out of

its presence, petitioner moved for a mistrial, pursuant to State v. Gilmore, 103 N.J. 508 (1986), alleging that the prosecutor had used his peremptory challenges systematically to exclude black women from the jury. (2T121-3 to 12). In the course of denying the Gilmore motion, the judge suggested that the motion was untimely despite the fact that it was made before the jury was sworn, as explicitly required by Gilmore. (2T128-3 to 5). The judge abruptly interrupted his ruling to criticize petitioner's physical reaction to the court's statement, accusing: "You laughed, you rolled your head, you threw yourself back in your seat." (2T128-7 to 9). As with the incident the day before, the judge's outburst was prompted solely by petitioner's physical reaction to the judge's ruling.

Petitioner immediately protested that

the judge's characterization was not accurate. (2T128-10 to 11). Other persons present in the courtroom at the time, including the court reporter and the judge's own court clerk, have since attested in affidavits entered to supplement the appellate record that, as far as they were able to observe, petitioner did not throw himself back in his chair, laugh, or utter any sound prior to being held in contempt. (231a-239a)

Before giving petitioner an opportunity to be heard as to either guilt or punishment, the judge found petitioner in contempt and released the jury, thereby terminating the proceeding:

> THE COURT: I find you in contempt of court. You'll be able to respond right now. I declare that this jury will be released. (2T128-13 to 15).

At that point, the judge released the jury, read from a state court opinion on contempt and again declared "I find you in

contempt. You may be heard before I pass sentence." (2T128-16 to 129-19).

Only after the judge had already decided the question of guilt did he allow petitioner to speak. Petitioner stressed that his actions were only a "human" reaction to his disappointment with the court's rulings and that he intended no disrespect. Petitioner's remarks also reflected a strong disagreement with the judge's characterization of his conduct. (2T129-21 to 131-13). Nothing in the contemporaneous record indicates that petitioner spoke in anything but a respectful tone:

> MR. DANIELS: Judge, I'm a human being. I respond. I have shown no disrespect. I cannot help but be a human being.
>
> I have been in this courtroom now since Tuesday. Every single decision has gone against me. The Court has stood there and in my opinion, most respectfully, has done nothing other than act as a second Prosecutor throughout these proceedings.
>
> I have not at any time shown any

disrespect to the Court. I have reacted like a human being. I was disappointed with the Court's responses, with the Court's decisions during the course of these proceedings. My response to it was not yelling and screaming, not raising my voice, not screwing up my face, not jumping up and down, not showing any disrespect to any member of this courtroom, of this staff or to your Honor.

I am a human being. I was disappointed. I sat back in my chair as I have been sitting back in my chair and I lowered my head and I rubbed my eyes. That is all that I did.

I think that if we put on anybody in this courtroom right now that they would testify that I did nothing that was disrespectful to the Court. I did nothing other than sit back in my chair, put my head down and cover my eyes when the Court ruled that the objection in the Gilmore application was an application that was not timely made. The language could not be clearer. It must be done before the jury is sworn.

The application was made before the jury was sworn. The Court, in my view, was bending over backwards to find a way not to even hear the motion, although the motion was timely made.

THE COURT: Don't raise your voice.

MR. DANIELS: I'm sorry. I am obviously human and angry. I'm trying to show the most respect that I can for this Court.

> I did not engage in any conduct which by any stretch of the imagination can be deemed contemptuous.

In fact, eyewitnesses to the proceedings have since attested, in affidavits admitted by the Appellate Division to supplement the record, that petitioner's remarks in his own defense though vigorous, were neither sarcastic nor disrespectful. (236a) Even the prosecutor has attested that although he considered petitioner's initial comment as "confrontational", petitioner "argued his point vigorously but no more so than I had seen other attorneys do in the past." (233a)

The judge asked petitioner if he wanted to call any witnesses. Wishing to marshal a defense, petitioner asked for time to collect his thoughts. Although the underlying trial was over, this

request was denied. The judge pressed petitioner: "Respond now. Do you wish to call any witnesses or anybody who saw what you did?" Petitioner asked to consult with an attorney. That too was refused. Not having any time to prepare his defense or consult with counsel, and being denied the opportunity to speak to any prospective witnesses, there was no other evidence petitioner could have offered in his defense. (2T132-9 to 19).

The judge again found that petitioner had laughed and pronounced sentence: "I find you in contempt of Court and I sentence you to two days in the County Jail and a $500 fine, which will be carried out immediately." (2T133-6 to 8). At no point in the contemporaneous record did the judge find that petitioner through his actions had obstructed or disrupted the proceeding,[2] nor did the judge

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2. The judge never cited petitioner for contempt for the March 18, 1986 exchange.

consider the aggravating and mitigating factors, as required by New Jersey law, prior to sentencing.

On March 24, 1986, five days later, the judge issued a Supplemental Order of Contempt, which dramatically embellished on, and in many respects contradicted, the contemporaneous record. (209a) Thus, while the judge had indicated on March 18th only that petitioner had shaken his head and smiled, the judge characterized petitioner's conduct that day as "consist[ing] of various expressions of disrespect during the reading of an opinion, including shaking his head, laughing and rolling his eyes and head to

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In fact, on that day, as previously noted, the judge accepted petitioner's apology and explanation.

The judge mentioned the March 18th exchange in a supplemental order but again did not find petitioner in contempt for that exchange. Rather, the judge characterized the first incident as a "warning" that the March 19th incident was to be viewed "in light of." (221a)

express his disapproval and scorn." (209a). Also for the first time, the judge characterized petitioner's tone of voice as "sarcastic" (id. ¶¶ 4-5), an accusation that petitioner had not been able to address at the time. Similarly, for the first time with regard to the March 19, 1986 incident, the judge again accused petitioner in the supplemental order of employing a "contemptuous", "sarcastic", and "disrespectful" tone of voice. (Id. ¶¶ 12, 15, 16 and 21).

In addition, for the first time, the judge baldly stated that petitioner's conduct had been "disruptive to the proceedings of the Court". (Id. ¶ 20). Finally, the judge, also for the first time, addressed his responsibilities as to sentencing and claimed to have weighed aggravating and mitigating factors as to sentencing at the hearing. The judge then

stated that he found the aggravating factors outweighed the mitigating factors, even though he "assumed" that every mitigating factor was applicable to petitioner. (Id. ¶23).

The Opinion of the New Jersey Supreme Court

The New Jersey Supreme Court affirmed petitioner's summary contempt conviction for a single fleeting grimace[3] of frustration in response to one of many rulings in the course of two days of pre-trial argument in a serious and hotly

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3. The trial judge suggested in his supplemental order, that a few comments made by petitioner in addressing the warning by the judge on March 18, 1986 and trying to defend himself the next day were contemptuous or contributed to the finding of contempt. However, the New Jersey Supreme Court determined that petitioner's "objectionable conduct was nonverbal". (App. 35a-36a). In reviewing a finding of contempt, "the question is not upon what evidence the trial judge could find petitioner guilty but upon what evidence the trial judge did find petitioner guilty." Eaton v. City of Tulsa, 415 U.S. 697, 698 (1974) (emphasis in original).

contested criminal case. The Appellate Division had held, by a divided court, that the United States Constitution does not restrict the substantive scope of the state's contempt power. App. at 151a-152a. The state Supreme Court, affirming the appellate court's decision, interpreted the state's judicial contempt power[4] as authorizing summary punishment for conduct that has "the capacity to obstruct the administration of justice." App. at 25a, 52a.[5] In addition to endorsing the use of

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4. N.J.S.A. 2A:10-1(a) defines contempt as: "Misbehavior of any person in the actual presence of the court."

5. The New Jersey Supreme Court in Daniels described the contempt power alternatively as proscribing:

> any act which is calculated to or tends to embarrass, hinder, impede, frustrate or obstruct the court in the administration of justice, or which is calculated to or has the effect of lessening its authority or its dignity; or which interferes with or prejudices parties during the course of litigation, or which otherwise tends to bring the authority and administration of the law into

summary procedures to punish such unobstructive behavior, the state court ignored the due process need for a plenary hearing to resolve a genuine factual dispute as to the nature of the facial gestures at issue. Finally, the court held that there is no federal constitutional right to counsel in a summary contempt proceeding, even where actual imprisonment is imposed.

> disrepute or disregard. In short, any conduct is contemptible which bespeaks of scorn or disdain for a court or its authority. (Citations omitted) (Emphasis added).

(App. at 48a-49a).

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES CRITICAL ISSUES CONCERNING THE CONSTITUTION'S LIMITATIONS ON THE SUBSTANTIVE SCOPE OF THE COURTS' CONTEMPT POWER AND THE CONSTITUTIONAL PROTECTION OF VIGOROUS ADVOCACY

It has been nearly two decades since this Court last considered the constitutional limitations on the power of contempt to punish an attorney or pro se litigant for advocative expression. See In re Little, 404 U.S. 553 (1972); In re McConnell, 370 U.S. 230, 233-34 (1962). Despite the holdings in those cases that the summary contempt power is limited, respectively, to punishing imminent threats of obstruction or actual obstructions of the administration of justice, both these standards have been widely disregarded by state courts, including the court below.

There is a substantial split of authority among both state courts of last

resort and federal circuits as to the constitutional confines of the contempt power.[6] Indeed, a majority of state statutes define contempt more broadly than actual obstruction of justice, or even imminent threat of obstruction, and a great number of states have failed to narrow their contempt laws to these constitutional tolerances by authoritative judicial construction.[7] These open-ended

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6. See, e.g., Weiss v. Burr, 484 F.2d 973, 982 (9th Cir. 1973) (state prosecutor's conduct measured by standard of "significant, imminent threats to fair administration of justice"); Hawk v. Cardoza, 575 F.2d 732, 735 (9th Cir. 1978) (applying actual obstruction standard to contempt of criminal defense attorney in state court proceeding); State v. Harper, 297 S.C. 257, 376 S.E.2d 272, 274 (1989) (actual obstruction standard); Ex parte Krupps, 712 S.W.2d 144, 150 (Tex. Ct. App. 1986), cert. denied, 479 U.S. 1102 (1987) ("criminal contempt is not restricted to conduct that obstructs or tends to obstruct the proper administration of justice."); and note 7, and accompanying text, infra (applying standards broader than imminent threat test).

7. See, e.g., Cal. Penal Code. §166 (West 1988); Mo. Ann. Stat. §476.110 (1987); N.Y. Stat. Ann. Art. 19, §750 (McKinney 1988); Minn. Stat. Ann. §588.01 (1988);

definitions of contempt, such as the "capacity" to interfere with the administration of justice, announced by the court below, make it extremely difficult to know before the fact, except in the most obvious instances, whether an attorney's conduct is punishable. Moreover, the expansiveness and inherent vagueness of such unbridled standards delegate an unacceptable level of discretion to trial judges, fostering arbitrary and discriminatory application.[8]

Mont. Rev. Codes Ann. §45-7-309 (1989); Neb. Rev. Stat. §25-2121 (1989); N.C. Gen. Stat. §5A-11 (1986); Ore. Rev. Stat. §33.010 (1983); S.D. Codified Laws Ann. §16-15-2 (1987); Utah Code Ann. §78-32-3 (1987); Wis. Stat. Ann. §785.01 (West 1981).

In addition, the laws of many states only grant the authority to the courts to punish conduct as contempt but make no effort even to define the offense. See, e.g., Colo. Rev. Stat. 10-1-104 (1978 Repl. Vol. 8); Fla. Stat. Ann. 900.04 (West 1984); Ill. Rev. Stat. ch. 38, §§1-3 (1989); R.I. Gen. Laws Ann. §§8-6-1 (1985); Tex. Govt. Code. Ann. §21.002 (Vernon 1988); Vt. Stat. Ann. tit. 12, §§121-23.

8. This Court and others have repeatedly

In essence, the substantive scope of the contempt power is governed largely by the personal sensibilities of state trial judges, who too frequently run roughshod over attorneys' first amendment rights and the sixth amendment rights of their clients to the vigorous representation of counsel.[9]

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recognized the inherent vagueness even of the constitutionally permissible standards used to define contemptuous conduct. See, e.g., Bridges v. California, 314 U.S. 252, 260 (1941) (acknowledging that the contempt power is "based on a common law concept of the most general and undefined nature."); Green v. United States, 356 U.S. 165, 200 (1958) (Black, J., dissenting) (contempt is the offense "with the most ill-defined and elastic contours in our law."); United States v. Seale, 461 F.2d 345, 369 (7th Cir. 1972) ("Obstruction [of the judicial process] is an elusive concept which does not lend itself to general statements.").

9. Indeed, there is considerable consensus that trial judges even in those jurisdictions that employ the actual obstruction standard, including the federal courts, have generally overreached in their exercise of the contempt power. See, e.g., Kuhns, The Summary Contempt Power: A Critique and a New Perspective, 88 Yale L.J. 39, 76 (1978); Harris v. United States, 382 U.S. 162 (1965). This is borne out by the unusually high

Furthermore, even under proper constitutional standards, the highest courts of other states also have upheld contempt convictions for the similarly unobstructive conduct of counsel in the representation of their clients' cases. Most recently, the Supreme Court of Connecticut affirmed the contempt conviction of an attorney who criticized, as "totally outrageous," a very substantial prison sentence that had just been imposed on his client, because "the authority and dignity of the court [was] immediately imperil[ed]." See In re Dodson, 214 Conn. 344, 359 (1990).[10]

It is critical, therefore, that this Court address this expansive problem

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reversal rates in summary contempt cases. See p. 58-59, infra.

10. The undersigned has been advised by counsel for the defendant in that case that a Petition for Certiorari will be timely filed with this Court.

existing throughout the country to ensure the protection of federal constitutional rights in state courts. It is equally essential that the bench and bar have appropriate guidance as to the limits of the contempt power to punish advocacy undertaken in good faith. For excessive use of the contempt power is inevitably self-defeating; it deters the zealous advocacy of adversaries upon which our judicial system primarily relies to expose the truth and achieve justice.

A. THE DEFINITION OF CONTEMPT AS ANNOUNCED BY THE NEW JERSEY SUPREME COURT IS UNCONSTITUTIONALLY OVERBROAD

The Court has recognized that the contempt power can infringe three sets of constitutional guarantees: the first amendment freedoms and procedural due process rights of the contemnor, and the litigant's right to effective counsel and zealous advocacy protected or mandated by

the sixth amendment and due process guarantees of the fourteenth amendment. This Court has steadfastly insisted that the judicial contempt power must be limited to "the least possible power adequate to the end proposed", See, e.g., In re Michael, 326 U.S. 224, 227 (1945); In re McConnell, supra at 233-34, a constraint which has been uniformly interpreted by this Court to restrict both the substantive scope of contempt, McConnell, supra; Michael, supra at 227, and the procedures used to try the contempt. Harris v. United States, 382 U.S. 162, 165 (1965).

Beginning with Bridges v. California, 314 U.S. 252 (1941), this Court has consistently reversed contempt convictions for out-of-court speech critical of the conduct of judges. In all of these, the Court has held that the first amendment

prohibits exercise of the contempt power to punish extrajudicial speech unless the substantive evil threatened "is extremely serious and the degree of imminence extremely high", or in other words, unless such speech rises to the level of a clear and present danger. Id. at 263. See also, Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947). Expression in a courtroom is entitled to the same first amendment protection. Eaton v. City of Tulsa, 415 U.S. 697, 698 (1974) (per curiam) (reversing state court contempt conviction of witness who described assailant as "chicken shit", because expletive failed to "constitute an imminent threat to the administration of justice.").

This Court has imposed the most stringent restrictions on the contempt power to protect the vigor of advocacy. In In re McConnell, supra, the Court

recognized that the question whether an attorney's conduct constitutes an obstruction must be viewed in light of a lawyer's role in representing his client. After being instructed by the trial judge to refrain from asking certain questions, McConnell persisted in asserting his right to ask the questions and announced that he "propose[d] to do so unless some bailiff stops us", for which he was held in contempt. Id. at 232.

This Court reversed the conviction because McConnell's repeated insistence that he be allowed to ask the questions at issue was nothing more than advocacy undertaken in good faith:

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here.

Id. at 236.

In McConnell, the Court was reviewing a contempt conviction based upon the federal contempt statute, which defines contempt as an actual obstruction of the administration of justice.[11] In In re Little, supra, this Court extended its substantive limitations on the contempt power to protect arguments made before a jury in a state court proceeding. In Little, a pro se criminal defendant was held in contempt for arguing in his closing to the jury that he was a political prisoner and accusing the court of prejudice against him. The Court reversed, concluding that:

> The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely likely, threat to the administration of justice. (citation omitted).

Id. at 555. The Court relied explicitly

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11. See note 12 infra.

upon McConnell in determining that, under the Constitution, a pro se defendant, was "clearly entitled to as much latitude in conducting his defense as we have held is enjoyed by counsel vigorously espousing a client's cause." Id.

Although it is clear that the imminent threat of obstruction standard marks the minimum protection of the Constitution against the contempt power, there remains some need to clarify whether the full extent of the constitutional limit is governed by the actual obstruction standard.[12] The few federal

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12. In Bridges, the Court noted that its decisions applying the clear-and-present danger test "do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights." 314 U.S. at 263. Bridges also noted that the actual obstruction standard, defining contempt in the federal statute, 28 U.S.C.A. §385 (presently 18 U.S.C. §401),

> viewed in its historical context, [indicates] a respect for the prohibitions of the First Amendment, not as mere guides to the formulation of policy, but as

and state courts to have explicitly considered whether the obstruction standard set forth in McConnell is a constitutional limitation, have reached divergent conclusions.[13] See, note 6 supra. Nevertheless, even under the imminent threat test, New Jersey's contempt statute, interpreted by the

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commands the breach of which cannot be tolerated. Id.
314 U.S. at 267.

13. In fact, in the context of contempt, the actual obstruction and imminent threat standards reflect identical constitutional concerns, and should produce comparable results. See Raveson, Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power, 65 Wash.L.Rev. ___ (July, 1990). Numerous Circuits, deciding cases under the federal contempt statute, therefore, have relied upon the Supreme Court's treatment in Little of the actual obstruction standard and the imminent threat test for contempt as functional equivalents. See, e.g., United States ex rel. Robson v. Oliver, 470 F.2d 10, 14 (7th Cir. 1972); United States v. Lumumba, 794 F.2d 806, 808 (2d Cir. 1986); Matter of Contempt of Greenberg, 849 F.2d 1251, 1255 (9th Cir. 1988); Gordon v. United States, 592 F.2d 1215, 1217 (1st Cir. 1979).

state's highest court to permit punishment for conduct that merely has the "capacity" or "tendency" to obstruct justice, and the statutes of the great number of states that similarly define contempt, proscribe a substantial amount of constitutionally protected activity, including valued advocacy, and are therefore unconstitutionally overbroad on their face.

The essence of the clear and present danger or imminent threat test is that the immediacy of the harm threatened by certain behavior is so near to a consummated injury that the behavior has the quality of a punishable attempt to bring about the harm. Nothing could be more antithetical to the Constitution's reverence for free expression, and for the sixth amendment rights of criminal defendants implicated in this Court's

cases protecting advocacy from the contempt power, than for a court of law to punish conduct based on the speculative nature of the danger within the grasp of the capacity or tendency standard.

Indeed, in Bridges v. California, supra, this Court already struck down, as violative of the first amendment, the power of a judge to punish extrajudicial expression as contempt on a finding of "an inherent tendency" or "reasonable tendency" to obstruct the orderly administration of justice in a pending case, 314 U.S. at 223. These standards were even more restrictive than a mere capacity to obstruct.

Under the actual obstruction standard, the overbreadth of the opinion below is even more pronounced. It is essential to prevent state courts from trammeling the constitutionally protected rights of expression and effective

representation of counsel that lie at the heart of our adversary system. This Court should invalidate the definition of contempt used by New Jersey and so many other states, and settle the constitutional limits on the contempt power.

B. PETITIONER'S MOMENTARY GRIMACE OF FRUSTRATION IN RESPONSE TO THE TRIAL COURT'S RULING FAILED, AS A MATTER OF LAW, TO CONSTITUTE CONTEMPT

In determining whether conduct amounts to contempt, this Court made it clear in Bridges, McConnell and Little that the contempt power does not extend so far as to undermine an attorney's obligation to vigorously represent his client, and must be restrained from violating fundamental rights of expression and representation. This Court's constitutional limitations on the contempt power also contemplate that judges will

not be overly sensitive and wield the power to punish minor affronts that do not obstruct the administration of justice. In Craig v. Harney, supra, this Court reversed contempt convictions imposed for a series of published editorials that were intemperate and unfairly critical of a judge in a pending matter. The Court ruled that "a judge may not hold in contempt one 'who ventures to publish anything that tends to make him unpopular or to belittle him....'" 331 U.S. at 376 (citation omitted). The Court explained:

> [T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.

Id. Accord In re Little, 404 U.S. at 555. Cf. Offut v. United States, 348 U.S. 11, 14 (1954) (noting that a judge's power to hold in contempt is "totally unrelated to his personal sensibilities," and that

judge has an obligation to avoid "unwittingly identifying offense to self with obstruction to law...").

The fundamental necessity of proceeding with a trial justifies application of the contempt power to prevent obstructions and disruptions. But where nothing more than personal discourtesy or irritating conduct is involved, it should not be punished when it falls short of interfering with the nature of the trial. McConnell and Little clearly reject disrespect and discourtesy as independent grounds for contempt. Mr. McConnell's threatened disobedience of the court's order in unequivocal and confrontational terms involved an affront to the court's dignity which would certainly have been punishable had disrespect been an independent basis for contempt, or had the Supreme Court envisioned any easy correspondence between

affront and obstruction. By itself, McConnell's constitutionally mandated tolerance of conduct more disrespectful and willfully defiant of the court's authority than petitioner's transient gesture of disagreement with the judge, requires reversal of his conviction here. Indeed, not a single federal case upholds a contempt conviction for conduct as inadvertent and unobstructive as petitioner's.

Minor excesses of advocacy and momentary lapses of decorum are not contemptuous; contempt cannot begin exactly where the limits of proper advocacy end. Occasional excesses are the inevitable byproduct of encouraging the most vigorous permissible advocacy that drives our system of justice. If judges, based on individual biases or notions of decorum, can demand from attorneys the

kind of exquisite control necessary to avoid fleeting and trivial excesses, attorneys could protect themselves from contempt citations only by steering clear of the outermost bounds of proper advocacy.

Therefore, even where a specific excess, such as petitioner's facial expression, might not be considered to be condonable advocacy, the vigorousness of advocacy is critical to our system of justice. That vigorousness, mandated by the sixth amendment, cf. Anders v. California, 386 U.S. 738, 744 (1967) ("fair process can only be attained where counsel acts in the role of an active advocate"), can be preserved only if we permit the expression of advocacy in which such excesses inadvertently arise. Analogously, because "erroneous statement is inevitable in free debate", this Court has found it necessary to protect the

vigorousness of expression by mandating the "actual malice" rather than mere falsehood standard in defamation actions, in order to neutralize the chilling effect of possible liability for inadvertent misstatements. New York Times v. Sullivan, 376 U.S. 254, 271-72 (1964). Adequate protection of the zealousness of trial advocacy requires that a similar buffer zone be fashioned around in-court expression that is valuable to the realization of justice, in order to insulate it from the contempt power. See Raveson, Advocacy and Contempt: Ensuring Adequate Breathing Room for Advocacy, 65 Wash. L. Rev. ___ (Oct. 1990).

The court below concluded that "lawyers [are required] to display a courteous and respectful attitude ... towards the court...." App. at 66a. But, if petitioner's momentary shudder of

disappointment or disagreement with a critical ruling, made outside the presence of the jury, can justify the imposition of criminal penalties, the delicacy of etiquette will have displaced the rigors of advocacy in our system of justice. In these circumstances, even the very respect that the trial judge sought to command by holding petitioner in contempt can only be undermined.

II. **THE OPINION BELOW, UPHOLDING THE SUMMARY IMPOSITION OF IMPRISONMENT TO PUNISH A MINOR LAPSE OF DECORUM, ABOUT WHICH A GENUINE FACTUAL DISPUTE EXISTED, CONTRADICTS THIS COURT'S CASES AND IMPLEMENTS AN UNCONSTITUTIONAL STANDARD**

The opinion below essentially authorized the use of summary procedures whenever,

> an attorney's conduct in the actual presence of the court has the capacity to undermine the court's authority and to interfere with or obstruct the orderly administration of justice.

App. at 28a. The New Jersey Supreme Court's decision endorses a standard for the imposition of summary punishment that is even less stringent than the constitutional limitations on the contempt power in plenary proceedings.[14] See Point

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14. Although the court below noted that summary procedures are permissible only where "immediate punishment is essential to prevent demoralization of the court's authority before the public." App. at 28a-29a, it explicitly equated such exigency with the circumstances of what it considered to be "[the] narrow exception to due process requirements", quoted above. Id.

I, supra. Moreover, the state court's opinion is wholly inconsistent with this Court's prior cases justifying and limiting the use of summary proceedings to punish contempt.

This Court has relied on two independent justifications for the instantaneous imposition of criminal contempt sanctions.[15] First, immediate punishment without the delay inevitably caused by plenary proceedings is necessary to punish serious disruptions of the court's business and to vindicate the courts' dignity or authority. See, e.g., United States v. Wilson, 421 U.S. 309, 316 (1975). Second, because the contemptuous acts occur in sight of the judge, a hearing may not be necessary to adjudicate

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15. In Bloom v. Illinois, 391 U.S. 194, 201 (1968), this Court determined that "[c]riminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both."

the facts. See, e.g., Cooke v. United States, 267 U.S. 517, 534-36 (1925). These justifications serve simultaneously as limitations on the contempt power: unless both conditions are present, proceeding summarily violates due process.

However, it is natural (as reflected in the opinion below), that once a judge determines there is an overriding necessity for summary punishment, little consideration is given to the question whether petitioner would have benefited from particular procedural safeguards. Conversely, the rationale that a judge's personal observation of allegedly contumacious conduct obviates the need for notice and a hearing too frequently discourages careful consideration of whether the necessity for summary action actually exists.

This Court has previously set the

ends of the spectrum of the kind of necessity which permits the immediate imposition of sanctions. See, United States v. Wilson, 421 U.S. 309 (1975) (upholding summary contempt convictions of trial witnesses for refusal to testify); Taylor v. Hayes, 418 U.S. 488 (1974) (attorney summarily held in contempt at conclusion of trial for conduct during trial entitled, as matter of due process, to notice and opportunity to be heard); Harris v. United States, 382 U.S. 162 (1965) (notice and hearing required under Fed. R. Crim. P. 42(b) before imposing contempt sanctions against recalcitrant grand jury witness). However, this Court has not identified with precision the dividing line that marks the limit of the power to proceed summarily. Nor has the Court considered circumstances in which a reasonable factual dispute may require a plenary hearing despite the fact that the

allegedly contemptuous behavior occurred in the presence of the judge. This case provides the Court with an appropriate and compelling factual setting for delineating with far greater precision the constitutionally required degree of process due in contempt adjudications.

A. There Was No Necessity in This Case For the Imposition of Summary Punishment

Whatever the constitutional limit on the definition of contempt generally, this Court has repeatedly explained that only the necessity of responding instantly to an actual obstruction excuses full compliance with the Constitution's command for due process. See, In re McConnell, supra at 233-34; In re Michael, supra at 227; Ex parte Hudgings, 249 U.S. 378, 382 (1919). In all of these cases the Court was reviewing contempt convictions arising under the federal obstruction standard.

Although there was no need for the Court to reach the constitutional issue, all of these decisions explicitly articulate the obstruction standard as a constitutional limitation and reveal that the Court was reading the federal statute in the light of its constitutional underpinning. This Court should take this opportunity to impose this most basic guarantee of due process as a constitutional limitation on the state courts' contempt power. See, e.g., Spruell v. Jarvis, 654 F.2d 1090, 1094 (5th Cir. 1981) (reversing state court's use of summary proceedings because defendant's "conduct cannot be said to have amounted to an obstruction of the orderly administration of the judicial process."); Wolfe v. Coleman, 681 F.2d 1302, 1306 (11th Cir. 1982) (affirming use of summary proceedings on standard of intentional obstruction of ongoing court

proceedings).

Even assuming that petitioner's physical gestures constituted an actual obstruction, they surely were not so threatening as to trigger the compelling need to dispense with all of the procedural protections developed over centuries and deemed fundamental to our system of justice, in order to preserve the trial court's ability to administer justice. As the appellate courts below noted, petitioner's conduct caused no severe harm to the judicial system, App. at 179a, and [t]he facts of this case ... disclose the kind of incident that might occur any day in a courtroom. App. at 6a. The immediate infliction of criminal penalties by a judge who simultaneously acts as grand jury, prosecutor, sole witness, fact finder, and frequently the perceived victim of the alleged contempt, is such an extraordinary anomaly in the

law that it has been permitted by this Court only where there is a compelling need for an immediate remedy. See Harris v. United States, supra at 164-66. Its use to punish nonverbal expressions to which the trial judge took personal affront is entirely alien to this Court's development of the law.

B. A Hearing Was Indispensable To Resolve a Reasonable Factual Dispute and to Determine Whether Petitioner Acted With Wrongful Intent

However urgent the court's need to respond instantly to behavior that is truly obstructive, the only justification for permitting a judge to proceed summarily is that having witnessed the events in question, it is not necessary to hold an evidentiary hearing to determine what occurred. Even where the conduct in question is unambiguous language captured in the contemporaneous record, courts must be on guard against the understandable tendency to confuse a desire for efficiency, in the face of a real need for instant vindication of the court's authority, with the ability to find facts fairly without a hearing. For it is not simply the judge's presence as a witness that excuses the need for a trial. Rather, there is no need for a hearing where the judge is a witness, only in the

absence of a genuine issue of fact. See Panico v. United States, 375 U.S. 29, 30 (1963) (per curiam) (reversing summary contempt conviction because defendant entitled to hearing on question of his criminal responsibility).

But where, as here, the trial court was faced with the difficulty of determining whether facial gestures, which are inherently ambiguous, were made willfully and with the intent to obstruct or demonstrate disrespect[16]; petitioner denied the judge's description of his physical expressions; and offered a good-faith explanation that he intended no

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16. As the dissenting judge in the Appellate Division in this case explained,

> a court must be cognizant of the fact that persons may make facial grimaces and other gestures unwittingly, especially when they are under emotional stress. Therefore, it may be more difficult than in a case involving another form of contempt for a court to determine whether a facial expression or gesture is made willfully with an intention to disrupt or to cause disrespect for the court.

(196a)

disrespect; the clear need for vital evidence to be provided by witnesses in the courtroom other than the judge made conviction by summary process wholly untenable.[17] Indeed, the affidavits accepted by the appellate court to supplement the record, of other witnesses in the courtroom materially contradicting the trial judge's characterization of petitioner's behavior, demonstrate not only that there was an obvious need for an evidentiary hearing but that the judge's reliance solely on his own perceptions in fact resulted in faulty findings.

In essence, the decision below

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17. Although the trial court asked petitioner if he wished to call any witnesses during the summary proceeding, the court refused to allow him to speak to prospective witnesses before calling them. This specious opportunity must be deemed a denial of the right to adduce testimony, rather than a waiver of that right. If counsel in any other criminal proceeding called witnesses without speaking to them first, it would surely be tantamount to malpractice.

permits the trial judge to take judicial notice of what occurred in his court, and of the intent of the alleged contemnor, even where those facts are reasonably in dispute.[18] Even in the anomalous arena of a contempt proceeding, surely the determination as a matter of law that in the face of conflicting evidence the judge could not have misperceived,

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18. The court below prefaced its opinion with the representation that it would accept the version of the facts set forth in petitioner's briefs, App. at 6a, and made note of the affidavits filed with the appellate court attesting that other witnesses in the courtroom, including the court reporter and the judge's court clerk observed, in contradiction to the judge's findings, that petitioner never threw himself back in his chair, laughed, or uttered any sound prior to being held in contempt, nor sounded sarcastic or disrespectful. App. at 14a. Despite all this, the court below concluded that, "we must deal with the record as we have it", id., ignoring the fact that these affidavits were made part of the record. The court noted further that petitioner, "continued to maintain that he had done nothing to offend the dignity of the court. But the court saw and heard the conduct of defendant." App. at 63a.

misinterpreted, or incorrectly remembered the events in the courtroom, fails to provide the constitutional quantum of process due.[19] See Kuhns, supra, 88 Yale

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19. Because a summary contempt proceeding provides so few guarantees of fundamental fairness, the detachment of the judge assumes even greater than ordinary importance. See, e.g., Taylor v. Hayes, 418 U.S. 488, 501 (1974) (holding due process violated in summary contempt disposition where judge demonstrated "such a likelihood of bias or appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interest of the accused."). This is particularly so, where as here, a reasonable question is raised as to the accuracy of the judge's findings of fact.

Evidence of the judge's inability to try petitioner impartially is extensive. There was a mounting display of antagonism by the judge toward petitioner. The judge took great personal offense at mild physical gestures of frustration. He was ready with a state court contempt opinion on the bench. His reaction was instantaneous and vehement, including finding petitioner in contempt twice and releasing the jury to end the trial prior to permitting him to address the charge; refusing petitioner a moment to collect his thoughts or talk to prospective witnesses in the courtroom before addressing the court; imposing a prison sentence without any consideration of aggravating and mitigating circumstances as required by state law, which was reversed by the appellate court as an

L.J. at 49-50 (challenging judge's ability to make accurate findings of what occurred and mens rea of alleged contemnor without evidentiary hearing); Note, Criminal Law - Contempt - Conduct of Attorney During Course of Trial, 1971 Wis. L.Rev. 329, 347-48 (defendant's intent may be impossible to establish without hearing).

Finally, this Court has been sensitive to the need for expanding due process protections as the magnitude of the liberty interest and the risk of error in the fact-finding process increase. See Morrissey v. Brewer, 408 U.S. 471, 489 (1972). The Court should extend those standards to the area of contempt to determine that here, the custodial sentence imposed and the cumulative impact of the impediments to due process, if not

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abuse of discretion; and refusing to stay the sentence pending appeal of the conviction.

the individual deficiencies, themselves, made the kind of fundamental fairness mandated by Morrissey impossible in a summary proceeding.[20]

III. THIS COURT SHOULD RESOLVE A CONFLICT BETWEEN THE STATES AS TO WHETHER THE FEDERAL CONSTITUTION ENTITLES A PERSON TO THE REPRESENTATION OF COUNSEL BEFORE BEING IMPRISONED SUMMARILY FOR CONTEMPT

This Court has never had occasion to

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20. The New Jersey Supreme Court did note that because the trial in the instant case had been terminated, the need for immediate punishment was less pressing. App. at 63a. Moreover, the court below found that because the trial court sentenced petitioner to jail, summary procedures failed to afford the process due. App. at 63a-64a. However, despite these pronouncements, despite recognition by the court below that "the need for reliability was heightened in this case, because the attorney's objectionable conduct was nonverbal, and the record does not so easily lend itself to validating the judge's factual findings", App. at 35a-36a, and despite the fact that petitioner actually served time in jail, the state Supreme Court inexplicably concluded that reversal of petitioner's conviction was not necessary because he had "not suffered a consequence of magnitude by virtue of the appellate [court's invalidation of the jail term]." App. at 62a.

determine whether the fundamental right to counsel in all prosecutions which result in imprisonment for any term, established in Argersinger v. Hamlin, 407 U.S. 25 (1972), applies to an individual actually imprisoned for summary contempt.[21] The New Jersey Supreme Court's blanket holding that the constitutional right to obtain counsel upon request is inapplicable in such circumstances is representative of one side of a substantial split of authority among the federal Circuits and the states, including several state courts of last resort.[22]

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21. Although the appellate court stayed petitioner's custodial sentence pending appeal and ultimately reversed it, he actually served a portion of that sentence. Therefore, the right to counsel issue is not moot, because petitioner was actually imprisoned as a result of having been convicted without representation.

22. Compare, Johnson v. United States, 344 F.2d 401, 411 (5th Cir. 1965) (failure to afford contemnor opportunity to consult with counsel before being summarily convicted of criminal contempt violated due process); United States v. Sun Kung Kang, 468 F.2d 1368, 1369 (9th Cir. 1972)

Even where a compelling need exists to proceed summarily, the denial of

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(indigent contemnor entitled to appointed counsel before being summarily imprisoned for civil contempt under 28 U.S.C. §1826, which authorizes summary punishment) (n.b. although the court's opinion does not indicate whether the contempt was summarily imposed, I have been advised by counsel for the contemnor that it was); Commonwealth v. Abrams, 461 Pa. 327, 328, 336 A.2d 308, 309 (1975) (finding constitutional right to counsel for contemnors actually imprisoned); Pitts v. State, 421 A.2d 901, 906 (Supreme Ct. Del. 1980) (same with respect to specific case before the court); People v. Lucero, 196 Colo. 276, 283-84, 584 P.2d 1208, 1214 (Colo. Supreme Ct. 1978) (right to counsel for contemnor summarily imprisoned for civil contempt; error harmless); with United States v. Baldwin, 770 F.2d 1550, 1553-54 (11th Cir. 1985) (summarily convicted contemnor not entitled to right to counsel); Mann v. Hendrian, 871 F.2d 51, 52 (7th Cir. 1989) (same) (dictum); United States v. Anderson, 553 F.2d 1154, 1155 (8th Cir. 1977) (same) (dictum); Ciraolo v. Madigan, 443 F.2d 314, 319 (9th Cir. 1971) (same) (dictum); State v. Case, 100 N.M. 173, 178, 667 P.2d 978, 983 (N.M. Ct. App. 1983), aff'd after rem. 103 N.M. 574, 711 P.2d 19 (N.M. App. 1985) (denying right to counsel in summary contempt proceeding); Saunders v. State, 319 So.2d 118, 125 (Fla. App. 1975) (same); Skolnick v. Indiana, 388 N.E.2d 1156, 1164-65 (Ct. App. 1979) (same).

counsel is constitutionally tolerable only to the extent that the judge's observation of the allegedly contemptuous conduct would make such representation unlikely to have an appreciable impact on the contempt adjudication. However, even if the judge's perceptions of the events and his factfinding are unerring, there remains an overarching need for legal argument as to whether the conduct is contemptuous, whether the contemnor acted with the requisite intent, and, ultimately, as to sentencing. See Mempa v. Rhay, 389 U.S. 128 (1967) (extending criminal defendant's right to counsel to sentencing proceeding). Where an actual loss of liberty is summarily imposed, judicial efficiency at the expense of the right to have counsel address the court as to these crucial issues, comes at too great a price. Indeed, representation of counsel in this case might well have averted

petitioner's actual imprisonment, which the appellate court held to be an abuse of the trial judge's discretion.

The almost total reliance on the judge in a summary contempt hearing, who is acting under the perceived need to jail the contemnor instantly, rather than justifying the denial of counsel, only increases the necessity for representation to guarantee effective exercise of the contemnor's extremely limited opportunity to defend against the abusive or mistaken imposition of imprisonment.[23] See Kuhns, supra at 57-62 (arguing for absolute right to counsel of summarily imprisoned contemnor). This need could not be demonstrated more strikingly than by the

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23. The importance of representation by counsel is not diminished, as the court below suggests, App. at 33a, because petitioner is himself an attorney. An attorney surprised by the sudden initiation of contempt proceedings is not likely to be an effective advocate on his own behalf.

extremely high reversal rate of summary contempt convictions. See N. Dorsen & L. Friedman, Disorder in the Court: Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct 233-34 (1973). Nor could Argersinger's driving concern -- to protect against the "obsession for speedy dispositions, regardless of the fairness of the result", 407 U.S. 34, -- resonate with greater force than when a summarily convicted contemnor is rushed to prison.

CONCLUSION

The law of contempt as currently administered both in federal and state courts is extremely haphazard, resulting in serious violations of constitutional rights and substantial detriment to our system of justice itself. There is a compelling need for this Court to define the constitutional limitations on the contempt power and to clarify the procedure required in contempt proceedings to safeguard fundamental rights. For all the foregoing reasons, a Writ of Certiorari should be granted for review of the issues raised herein.

Respectfully submitted,

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